Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.	CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-15, 98-78, 98-91, and CCB/CPD No. 98-15 RM 9244

PETITION FOR RECONSIDERATION OF SBC COMMUNICATIONS INC., SOUTHWESTERN BELL TELEPHONE COMPANY, PACIFIC BELL, AND NEVADA BELL

SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell hereby seek reconsideration of two issues decided in the Commission's recent Memorandum Opinion and Order in these dockets (the "Advanced Services Order").[1]

First, the Commission should immediately reconsider its determination that incumbent LECs must alter their networks by "conditioning" loops at the request of new entrants. That

[1] Memorandum Opinion and Order, and Notice of Proposed Rulemaking, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Petition of Bell Atlantic Corp. for Relief from Barriers to Deployment of Advanced Telecommunications Services, Petition of U S WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services, Petition of Ameritech Corp. to Remove Barriers to Investment in Advanced Telecommunications Technology, Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act, Petition of the Ass'n for Local Telecommunications Services for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996, Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service, FCC 98-188, CC Dkt Nos. 98-147, 98-11, 98-26, 98-32, 98-15, 98-78, 98-91 and CCB/CPD No. 98-15 RM 9244 (rel. Aug. 7, 1998).

requirement is flatly inconsistent with the Eighth Circuit's decision in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted on other grounds, 118 S. Ct. 879 (1998). In its Local Competition Order, the Commission imposed on incumbent LECs an obligation to provide their competitors, upon request, access to network elements superior in quality to what the incumbent provides to itself. See First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15659 [¶ 314] (1996) ("Local Competition Order"). The Commission pointed specifically to loop conditioning as the prime example of its superior-quality requirement. Id. at n.680. On review, the Eighth Circuit squarely held that the 1996 Act does not permit the Commission to mandate such superior-quality access. Iowa Utilities Board, 120 F.3d at 813. In light of the Eighth Circuit's unambiguous ruling — a ruling that the Commission has not challenged in the pending Supreme Court case — the agency's attempt here to reimpose a loop-conditioning requirement is patently unlawful. The Commission should rescind it and do so promptly.

Second, the Commission should also reconsider its conclusion that section 706 provides the FCC with no independent authority to forbear from applying the Act's requirements on incumbent LECs. The Commission's understanding of section 706 is at odds both with the statutory structure and with Congress's objective that advanced telecommunications capability be rapidly made available to all Americans.

I. THE LOOP-CONDITIONING REQUIREMENT VIOLATES THE EIGHTH CIRCUIT'S MANDATE AND MUST BE RESCINDED.

The loop-conditioning requirements contained in the Advanced Services Order squarely conflict with the Eighth Circuit's holding in Iowa Utilities Board that the Commission lacks

authority to impose superior-quality requirements. Neither the Commission nor any other party sought review of that holding in its petition for certiorari, and, even if such review had been sought, that still would provide no basis for the Commission to ignore the square holding of the Court of Appeals. The Commission may not "disregard . . . the existing mandate of a federal court in a case in which the agency was a party litigant." Iowa Utilities Bd. v. FCC, 135 F.3d 535, 540 (8th Cir.) (granting petition to enforce the Court's prior mandate in light of FCC's assertion of pricing jurisdiction under section 271), petition for cert. filed, 66 U.S.L.W. 3623 (1998). Accordingly, it has no proper alternative other than to vacate the Advanced Services Order insofar as it purports to require incumbent LECs to condition their loops for the benefit of requesting carriers.

Paragraph 53 of the Advanced Services Order states that incumbents must take "affirmative steps" to "condition" their local loops so that an entrant may provide advanced services over the loops. For instance, if "a carrier requests an unbundled loop . . . free of loading coils, bridged taps, and other electronic impediments, the incumbent must condition the loop to those specifications, subject only to considerations of technical feasibility." Advanced Services Order ¶ 53. "The incumbent may not deny such a request on the ground that it does not itself offer advanced services over the loop." Id.

The Advanced Services Order's conclusion on this issue tracks the Commission's earlier conclusion in its Local Competition Order. See 11 FCC Rcd at 15691-92 [¶¶ 380-382]. Indeed, the relevant portion of the Advanced Services Order cites and quotes heavily from the earlier order. See Advanced Services Order ¶ 53. And the Local Competition Order made entirely clear that the loop-conditioning requirement was a subspecies of the Commission's broader

requirement that an incumbent LEC provide their competitors, upon request, with access to network elements that are higher in quality than what the LEC provides to itself. See 11 FCC Rcd at 15659 [¶ 314].

Indeed, the Commission specifically singled out loop conditioning as a paradigmatic illustration of its superior-quality requirement. The Local Competition Order offered, as an "example" of the superior-quality requirement, an incumbent LEC's obligation to "provide local loops conditioned to enable the provision of digital services (where technically feasible) even if the incumbent does not itself provide such digital services." Id. at 15659 n.680 (emphasis added).

On review of the Local Competition Order, the Eighth Circuit held that the Commission lacks authority to impose such superior-quality obligations. See Iowa Utilities Bd., 120 F.3d at 813. The Court of Appeals explained that "subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network — not to a yet unbuilt superior one." Id. Section 251(c)(3) "does not mandate that incumbent LECs cater to every desire of every requesting carrier," even if the incumbents will be "compensated for the additional cost involved in providing superior quality interconnection and unbundled access." Id. Relying on this analysis, the Court of Appeals vacated the specific Commission rule (47 C.F.R. § 51.311(c)) that purported to require incumbents to provide such superior access to network elements upon request. See 120 F.3d at 819 n.39.

In light of the Eighth Circuit's holding, there can be no serious dispute that the loop-conditioning portion of the Advanced Services Order must be reconsidered and rescinded. The dispositive points here are both simple and irrefutable: (1) the Eighth Circuit has held that the

Commission may not impose superior-quality obligations, and (2) the Commission itself frankly and unequivocally stated (when it believed it possessed the authority to impose such duties) that loop conditioning is an aspect of the subsequently invalidated superior-quality requirement. That should be the end of the matter. "After a court has spoken, the FCC is bound to follow that court's mandate." Iowa Utilities Bd., 135 F.3d at 540.

Although the facts discussed above are determinative here, we note briefly that, even without the Commission's own statements conceding the point, it is quite evident that the loop-conditioning obligations contained in the Advanced Services Order do, in fact, require incumbents to provide new entrants with superior-quality access to network elements. As the Advanced Services Order itself makes plain, these conditioning obligations require incumbents to improve their facilities so that they can be used to provide services that the incumbents do not currently provide over those facilities. In particular, the Commission has specifically required each incumbent, at the request of a competitor, to take "affirmative steps" to improve its loops so that those loops may be used to provide advanced services even if the incumbent "does not itself offer advanced services over the loop." Advanced Services Order ¶ 53. Put differently, the incumbents must create a "yet unbuilt superior" network that supports new services to be provided by the incumbent's competitors. Iowa Utilities Board, 120 F.3d at 813. That is precisely what the Eighth Circuit has held the Commission may not require.

II. THE ADVANCED SERVICES ORDER MISAPPREHENDS THE SCOPE OF THE COMMISSION'S SECTION 706 FORBEARANCE AUTHORITY

The Advanced Services Order concludes that section 706 contains no independent grant of forbearance authority, but merely authorizes the Commission to use forbearance authority

granted in other sections of the Act. Advanced Services Order ¶ 69. To reach this conclusion, the Commission reasoned that any other construction would "eviscerate" the forbearance exclusions set forth in section 10(d). Id. ¶ 73. Accordingly, the Commission decided that section 706(a) simply gives it "an affirmative obligation to encourage the deployment of advanced services, relying on [its] authority established elsewhere in the Act." Id. ¶ 74.

The Commission's ruling reflects a fundamental misunderstanding of sections 10 and 706. Section 10(a) directs the Commission to forbear from regulating a telecommunications carrier or service if the Commission, applying a three-part test, determines that such regulation is no longer necessary to protect consumers. 47 U.S.C. § 160(a)(1)-(3). Section 10(d) limits the ability of the Commission to forbear from exercising this section 10(a) forbearance authority, stating:

> Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

47 U.S.C. § 160(d) (emphasis added). Thus, section 10(d), by its plain terms, limits only the Commission's ability to exercise its forbearance authority under section 10(a). It nowhere restricts the Commission's exercise of forbearance authority under any other section of the statute, including section 706, and it therefore provides no basis for the conclusion that section 706 is not an independent grant of forbearance authority.

The Commission's Advanced Services Order neglects to explain how, given the express limitation of section 10(d)'s exclusions to "subsection (a) of this section," it is possible for section 10(d)'s forbearance exclusions to extend to section 706. Indeed, without explanation, the

Commission has entirely read section 10(d)'s restricting language out of the provision, in violation of the black-letter principle that "a statute should be construed so as to give effect to each of its provisions." See, e.g., First Report and Order and Notice of Proposed Rulemaking, Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905, 21981 [¶ 156] (1996). At the very least, the Commission must explain how it reached the conclusion it did, in light of the statute's plain language to the contrary.

In addition, the Commission's conclusion that the sole effect of section 706 is to give the agency an "affirmative obligation to encourage the deployment of advanced services," Advanced Services Order ¶ 74, essentially guts the forbearance obligations of section 706(a) of any meaning. Even without section 706, the 1996 Act requires the Commission to promote the deployment of advanced telecommunications technologies — indeed, implementation of this policy is one of the Act's principal objectives. See, e.g., Pub. L. No. 104-104, 110 Stat. 56 (1996) (stating that the purpose of the 1996 Act is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies") (emphasis added). Congress thus had no need to enact section 706 simply to articulate a preference for the speedy deployment of an advanced telecommunications infrastructure. Again, by reading section 706 in a way that renders it redundant of other statutory provisions, the Commission has run afoul of a fundamental canon of statutory construction.

Not only is the Commission's interpretation of section 706 at odds with the structure of the statute, but also it fails to further Congress's pro-competitive policy objectives. The

Commission simply assumes — without even a sentence of analysis — that subjecting incumbent carriers' deployment of advanced services to the requirements of sections 251(c) and 271 will further the goal of opening the advanced services market to competition. See Advanced Services Order ¶ 76. But Congress designed sections 251(c) and 271 specifically to open to competition the markets for conventional local exchange service. Certainly, from the face of the statute, it is far from apparent that regulation intended to make these established markets competitive should automatically apply to the very different and emerging market for advanced services. Indeed, as numerous parties showed in their petitions and comments, imposing burdensome unbundling, resale, and separate-affiliate requirements on incumbent carriers' provision of advanced services will deter broadband deployment. See, e.g., Petition of Southwestern Bell Telephone Company, Pacific Bell & Nevada Bell, Southwestern Bell Telephone Company, Pacific Bell & Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service, 26-30; Bell Atlantic Reply Comments, Petition of Bell Atlantic Corp. for Relief from Barriers to Deployment of Advanced Telecommunications Service, Petition of U S WEST for Relief from Barriers to Deployment of Advanced Telecommunications Services, Petition of Ameritech Corp. to Remove Barriers to Investment in Advanced Telecommunications Technology, CC Dkt Nos. 98-11, 98-26, 98-32 at 24-25. The Commission must at least respond to these showings.

Section 706 imposes on the Commission an obligation to promote the deployment of advanced telecommunications services to all Americans, an obligation that is plainly distinct from section 10's mandate that the FCC forbear from enforcing regulation that is no longer necessary to protect consumers. To achieve its objective, section 706 directs the FCC to forbear

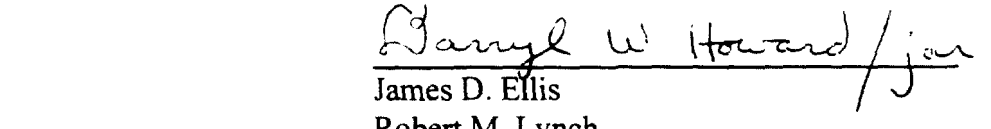
from imposing the requirements of the Act — including those set forth in sections 251(c) and 271 — on incumbent local exchange carriers, if such forbearance will encourage the development of broadband capabilities. The Commission's contrary interpretation is not supported by the 1996 Act, nor does it advance section 706's basic objective of making advanced telecommunications rapidly and widely available.

Accordingly, the Commission should reconsider both its determination that section 706 contains no separate grant of forbearance authority and its accompanying denial of petitioners' request for regulatory forbearance in this proceeding.

CONCLUSION

The Commission should (1) reconsider and vacate its order insofar as it imposes loop-conditioning obligations on incumbent LECs, and (2) reconsider its order insofar as it denies the petitions of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell for relief from regulation pursuant to section 706.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 1998, I caused a copy of the Petition for Reconsideration of SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell, to be served on the individuals on the attached service list by first-class mail.

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